

Mergers Realized Abroad under the Merger Control of the Amended German Act Against Restraints of Competition¹

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I. Introduction

When the Boeing Company (Boeing) in the summer of 1997 publicly announced its intent to acquire a majority interest in the McDonnell Douglas Corporation, this triggered the interest of not only business magazines and the companies' competitors, but also of antitrust authorities around the world. The result was a highly publicized struggle between Boeing and, in particular, the European Commission. As the guardian of competition in the European Union, one of the world's leading markets for airplane manufacturers, the European Commission's proceedings with Boeing nearly led to a trade war between the European Union and the United States. This demonstrated once again the paramount economic and political impact of a merger of such magnitude and the principal positions that collide when its consequences are assessed. Boeing and the U.S. government emphasized the national interest in saving jobs by merging the two airplane manufacturers whereas the European Commission and Boeing's competitors claimed their concern for free and fair competition was endangered by the combination of two major players in that market.

Since the European Commission found Boeing already had a market-dominating position in the worldwide market for large commercial jet aircraft, the European Commission held that serious effects on competition in that market would result from the proposed trans-

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1. The material in this article is in the nature of a general comment only. It is not offered as advice on any particular matter and should not be taken as such. Although the author has made every effort to provide accurate and up-to-date information, he expressly disclaims all liability to any person in respect hereof and in respect of the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this article. No client or other reader should act or refrain from acting on the basis of any matter or statement contained in this article without taking specific professional advice on the particular facts and circumstances in issue.

action and, therefore, made clear that it would not allow the transaction to be executed in the originally intended form. Following an intensive five-month negotiation between representatives of the European Commission and Boeing, however, the European Commission ultimately decided to declare the acquisition compatible with the Common Market, subject to full compliance with several commitments made by Boeing.²

To those not professionally engaged in international transactions, it may be surprising that a European institution is concerned about the acquisition of an American company by another American company and that it considers the legality of such a transaction. The reason is that the European Commission is entitled under the Treaty of Rome to control the anticompetitive effects of mergers on the Common Market, no matter where the transactions are executed, where the participating companies have their seats, or where they were founded.³

The German antitrust provisions set forth within the German Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB))⁴ follow the same approach of controlling foreign mergers. In this context, foreign mergers mean transactions that are not concluded or carried out in Germany but have an appreciable effect in German territory. According to section 130(2), the GWB is applicable to all transactions that restrain competition and have effects on competition within Germany, even if the transactions occur outside of Germany. As under the European regime, the applicability of the GWB does not depend on the registered seat of the enterprises involved or the country in which or under the laws of which a merger agreement was concluded or is carried out, but rather on whether a merger might have an effect on the competition in the territory for which the antitrust authority is competent (Effect Approach). Therefore, if such effect is considerable (the meaning of which is explained in detail in Part IV.B), the requirements of the GWB to give notice of merger projects to the Federal Cartel Office (*Bundeskartellamt* (FCO)) in Bonn⁵ are applicable and the FCO (subject to the restrictions described in Part VI.D) is authorized to prohibit the transaction.

The GWB has recently been amended. Following a long period of deliberation, the German Parliament passed the Sixth Amendment of the GWB⁶ (Amendment) on May 7, 1998. The goals of the Amendment are to harmonize the GWB to a greater extent with the law of the European Union, to incorporate further practical experiences under the former law, and to heed recent economic and political developments. The revised form of the GWB became effective as of January 1, 1999.

The Amendment did not only completely restructure and renumber the GWB but also changed it substantially in several parts. Whereas the wording of many provisions was kept

2. For details regarding the effects on competition and the commitments of Boeing, see Commission Decision, 1997 O.J. (L 336/16), and press information of the European Commission, IP 729 (1997), each as of July 30, 1997.

3. Article 85 (now Article 81) (1) of the Treaty of Rome prohibits "... all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market." See, e.g., Commission Decision of December 21, 1988 O.J. (L 74), 1, 14, 21, 34 (1989); CHRISTOPHER BELLAMY & GRAHAM D. CHILD, *COMMON MARKET LAW OF COMPETITION* 2-147 (4th ed. 1993).

4. *Gesetz gegen Wettbewerbsbeschränkungen*, 59 FEDERAL LAW GAZETTE [Bundesgesetzblatt] pt. I, 2547-75 (Sept. 2, 1998) [hereinafter GWB].

5. The seat of the FCO moved from Berlin to Bonn in 1999.

6. *Sechstes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, GAZETTE OF THE FEDERAL COUNCIL [Bundratsdrucksache] 418 (May 8, 1998).

intact and the Act merely renumbered, the merger control provisions, for instance, were revised materially. For this reason, this article will outline the new merger control requirements as provided in the revised Act by focusing on foreign mergers, particularly on the acquisition of assets or shares in an enterprise with a registered seat outside of Germany. With respect to the fact that the Amendment has only recently been passed, the following statements to some extent are based on the previous practice of the FCO, court decisions, and the literature regarding the former provisions of the GWB on the one hand, and the reasons for the Amendment as laid out in the Draft of the Amendment that the Federal Government issued on November 11, 1997,⁷ on the other.

The remarks give a brief outline of the main legal requirements and the questions usually raised. With respect to the individuality of the facts, given the specific circumstances that might be considerable in each case, and the limited purpose of this article, any foreign merger notification clearly requires the individual legal assistance of experienced lawyers before taking or refraining from any action.

When giving legal assistance to clients from abroad, the following questions, in particular, are often raised and are referred to in this article:

- Must a notification be filed and, if so, at what point in time?
- Which authority will be competent: the FCO or the European Commission?
- Which facts and information must be presented in the filing?
- How long will the procedures last?
- What are the consequences for a failure to notify? and
- Under what circumstances will the authorities prohibit the merger?

II. General Remarks

In general terms, if the GWB is applicable, the enterprises may have to observe notification requirements and should recognize the authority of the FCO to levy fines for failures to notify and even to prohibit the transaction under certain circumstances.

The decision as to whether a filing of a merger must be made at all and, if so, to which authority and at what point in time during the schedule for the transaction the filing must occur, particularly depends on the kind and size of the proposed transaction and the parties concerned. Briefly, under German as well as under European law, the authorities have to be notified of mergers before consummation, depending on the turnover the participating enterprises generated in the preceding fiscal year. Unlike, for instance, the laws of the United Kingdom or France, which refer alternatively to a turnover threshold or a market share threshold,⁸ neither European Union law nor German law refer to a specific market share threshold beyond which a notification is triggered. Instead, they only refer to turnover thresholds.

In summary, notification to the FCO is mandatory if the general notification requirements of the GWB are met, in particular, if the transaction does not fall within the scope

7. Gesetzesentwurf der Bundesregierung eines Sechsten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, *GAZETTE OF THE FEDERAL COUNCIL* 852 (Nov. 11, 1997).

8. Regarding French law, see Law No. 86-1243, art. 38 (Dec. 1, 1986); with respect to the law of the United Kingdom, see *OFFICE OF FAIR TRADING, MERGERS: A GUIDE TO PROCEDURES UNDER THE FAIR TRADING ACT 1973*, ch. 2, 2.2. lit. d (i) (1997).

of the EU Merger Control Regulation (*see infra* Part III) and, in the event of a merger carried out outside of Germany, if the GWB applies to the transaction (*see infra* Part IV). Notification to the FCO is formalized (*see infra* Part V) and its authority is considerable even though foreign mergers are only subject to limited control (*see infra* Part VI). The article concludes with a brief glossary of important terms (*see infra* Part VII).

III. Requirement to Notify the FCO of a Merger

The provisions of merger control under German law are set out under sections 35 to 43 of the GWB (until 1998, sections 23–24a). According to sections 35 and 39(1), notification to the FCO is mandatory if the proposed merger does not fall within the scope of the European law (*see infra* Part III.A), the participating enterprises achieve certain turnover figures (*see infra* Part III.B), and there is, in terms of section 35, neither an affiliation nor an insignificant market concerned (*see infra* Part III.C).

A. EU MERGER CONTROL REGULATION NOT APPLICABLE

The EU Merger Control Regulation (Regulation)⁹ applies exclusively to mergers that have a Community Dimension as defined in article 22 of the Regulation. According to article 1(2) of the Regulation, a Community Dimension is present where

- the combined aggregate worldwide turnover of all the enterprises concerned is more than ECU 5 billion; and
- the aggregate Community-wide turnover of each of at least two of the enterprises concerned is more than ECU 250 million;
- unless each of the enterprises concerned generates more than two-thirds of its aggregate Community-wide turnover within one and the same Member State of the European Union.

Additionally, in accordance with article 1(3) of the Regulation, which entered into force on March 1, 1998,¹⁰ a Community Dimension is present if

- the combined aggregate worldwide turnover of all the enterprises concerned is more than ECU 2.5 billion;
- in each of at least three Member States, the combined aggregate turnover of all of the enterprises concerned is more than ECU 100 million;
- in each of at least three Member States, the aggregate turnover of at least two of the enterprises concerned is more than ECU 25 million; and
- the aggregate Community-wide turnover of each of at least two of the enterprises concerned is more than ECU 100 million;

9. Council Regulation 4064/89, 1990 O.J. (L 257) 13, *amended by* 1997 O.J. (L 180) 1.

10. A revision of the scope of the aforementioned Regulation was subject to intense political discussion in recent years. Finally, on June 30, 1997, the Council of the European Union agreed that the current thresholds of article 1(2) of the Regulation should not be reduced but the scope of the Regulation extended by introducing this paragraph 3 into article 1 of the Regulation. The purpose of this amendment was to heed the significant cross-border effects of such mergers and to reduce the burden of multiple filings with national antitrust authorities in a number of different Member States.

- unless each of the enterprises concerned generates more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Notably, though the wording of the Regulation has not been amended yet, the thresholds now are calculated with reference to the EURO. According to article 21 of the Regulation, transactions concerning enterprises whose turnover figures surpass these thresholds must be filed only with the European Commission and no notification of the national antitrust authorities is required (one-stop-shop doctrine). The GWB expressly does not apply to mergers that fall into the scope of the exclusive competence of the European Commission.¹¹ Please note that the notification to the European Commission has to observe the formal requirements provided in the Regulation (in particular the Form CO), which is not a subject of this article.

If, upon proper notification, the European Commission concludes that the merger does not fall into the scope of the Regulation, the Commission will declare itself not competent and automatically and without an express transition by the European Commission, the relevant national antitrust authorities will gain competence to assess the merger.¹² However, even in cases where the Regulation applies, the national antitrust authorities might become competent to decide on the merger if the European Commission, under circumstances provided for in article 9 of the Regulation, refers the notified merger to them. In such cases, an additional notification to the FCO shall not be required if the FCO is in possession of the information requested under section 39(3) GWB and if the information is in German as required by section 39(4) GWB.

B. THRESHOLDS UNDER THE GWB

The GWB formerly, that is until 1998, distinguished between a post-merger notification (*Anzeige*), which was mandatory in all instances in which a merger had been consummated and where the aggregate turnover of the participating parties in the preceding fiscal year equaled or exceeded DM 500 million, and a pre-merger notification (*Anmeldung*), which was required for planned mergers in which any single participating enterprise in the last fiscal year achieved a turnover of at least DM 2 billion or two of the participating companies achieved a turnover of at least DM 1 billion each. The amended GWB, however, refrains from making any such distinction.

The amended GWB now requires pre-merger notification of all merger plans in which the participating enterprises (in the preceding fiscal year) achieved a combined worldwide turnover exceeding DM 1 billion and, additionally, at least one participating enterprise achieved a turnover within Germany exceeding DM 50 million,¹³ unless the "affiliation" or the "insignificant market" exemption is given.

C. NEITHER AFFILIATION NOR INSIGNIFICANT MARKET

The merger control provisions under the GWB do not apply to mergers that are considered to have only minor effects on the competition since they merely constitute an

11. GWB § 35(3).

12. See Heinz F. Löffler, *Art. 21 of the Regulation*, in *KOMMENTAR ZUM DEUTSCHEN UND EUROPÄISCHEN KARTELLRECHT* annot. 5 (Eugen Langen & Hermann-Josef Bunte eds., 8th ed. 1998) [hereinafter *Langen & Bunte*].

13. GWB §§ 35(1) and 39(1).

affiliation process or concern insignificant markets.¹⁴ In detail, sections 35–43 GWB do not apply to planned mergers in as far as

- an enterprise, which is not a dependent company under section 36(2) GWB (*see infra* Part VII.A), and which generated in the preceding fiscal year a worldwide turnover of less than DM 20 million, is merged with another enterprise (affiliation); or
- a market is affected in which goods or commercial services have been offered for at least five years and which, in the last calendar year, showed a turnover volume of less than DM 30 million (insignificant market).

Where the merger plan concerns competition in the production and distribution of newspapers, magazines, or parts thereof, only the insignificant market provision applies.¹⁵

D. CONSEQUENCES OF THE REQUIREMENT TO NOTIFY THE FCO

If the aforementioned facts exist, the FCO must be notified of the merger plan before its consummation.¹⁶ The details of such pre-merger notification are described under section V below.

According to section 41(1) GWB, the parties to a merger agreement that are not yet released by the FCO may neither consummate the transaction nor participate in its consummation within one month following the FCO's receipt of the complete notification. The one-month period can be extended within the discretion of the FCO by three months to a total of four months if the FCO informs the notifying enterprise(s) by formal letter within the first month (one-month letter) that it has entered into a "Phase II" investigation (*Hauptprüfverfahren*) of the merger plan and needs further time or information to decide on the merger. The FCO can release a transaction subject to conditions¹⁷ (*see infra* Part VI.A.3). If the one-month or the additional three-month period, respectively, expires without a decision by the FCO releasing or prohibiting the merger project, the planned merger, according to section 40(2) GWB, is deemed to be released unless:

- the notifying enterprises agreed to prolong the investigation period;
- the FCO failed to provide the one-month letter or issue a prohibition due to inaccurate or delayed information rendered by the enterprises; or
- in the case of an enterprise not having its seat in Germany, the enterprise failed to designate a recipient for the FCO's decisions within Germany.

Upon request, the FCO can release the enterprises from the ban against consummation if the enterprises present good cause for such release, in particular, in order to avoid substantial harm to an enterprise concerned or any third party.¹⁸ The FCO could suspend the ban at any time and impose conditions. The draft of the Amendment indicates that particularly in those cases of foreign mergers where it is impossible to provide the FCO with all required information in due time (*see infra* Part V.B), as well as in cases of mergers in

14. *Id.* § 35(2).

15. *See infra* Part VII.D for calculating the turnover figures of publishing companies.

16. GWB § 39(1).

17. *Id.* § 40(3).

18. *Id.* § 41(2).

the course of restructuring a failing company (*Sanierungsfusionen*), such a good cause might be given.

The parties must also give notice of the consummation of a merger plan that has been notified to the FCO immediately after such consummation.¹⁹ As reference need merely be made to the contents of the pre-merger notification filing, however, such notifications usually consist of only five or six lines.

IV. Applicability of the GWB on Mergers Realized Abroad

According to section 130(2) GWB (formerly section 98(2)), the GWB applies to all restraints of competition that have effects within Germany, that is, if they have a Domestic Effect, even if they are the result of agreements concluded or carried on outside of Germany. The approach in theory is that mergers might have a restraining effect on competition by supporting the process of concentration and resulting in a reduction of the number of competitors in a market. Therefore, if there is a merger in terms of the GWB and if the turnover of the relevant parties exceeds the aforementioned thresholds, the parties have to provide notice of the merger and it is not particularly necessary to further identify or prove any real effects for German markets in order to assess whether a notification must be made. As a result, the notification requirements under sections 35–43 GWB set forth above, and the authority of the FCO to prohibit mergers under certain conditions (*see infra* Part VI.A), are applicable even to mergers exercised abroad if they might have a Domestic Effect.

The GWB does not provide for further details regarding the particular circumstances under which mergers may produce effects on German markets. According to the courts,²⁰ any potential effect that is likely to result in a predictable, concrete, direct, and significant influence on the market structure in Germany is deemed to be a Domestic Effect in terms of the GWB.

In order to indicate its understanding of the law and to help enterprises contemplating a merger to assess the notification requirements, in January 1999, the FCO published a memorandum on Domestic Effects within the meaning of section 130(2) GWB in the case of mergers, which provides further insight into the authority's interpretation of that provision.²¹ Since the FCO is the competent authority to decide on the legality of a merger with respect to the GWB, its understanding of the law is obviously of significant importance to the enterprises participating in a merger project.

Within its memorandum, the FCO distinguishes between mergers realized within Germany (i.e., the target company's seat is in Germany) and those realized abroad (i.e., the target company's seat is not in Germany).

19. *Id.* § 39(6).

20. *See* Judgment of the Supreme Court of May 29, 1979, in *WIRTSCHAFT UND WETTBEWERB, ENTSCHEIDUNGSSAMMLUNG ZUM KARTELLRECHT, BUNDESGERICHTSHOF* [Economy and Competition, Compilation of Anti-trust Decisions, Supreme Court] [hereinafter *WuW/E BGH*] 1613, 1615 (1979); Judgment of the Kammergericht [Court of Appeals of Berlin] of July 1, 1983, in *WIRTSCHAFT UND WETTBEWERB, ENTSCHEIDUNGSSAMMLUNG ZUM KARTELLRECHT, OBERLANDESGERICHTE* [Economy and Competition, Compilation of Anti-trust Decisions, Courts of Appeals] [hereinafter *WuW/E OLG*] 3051, 3063 (1983).

21. Such memorandum is an update of a respective memorandum on the interpretation of the former section 98(2) GWB that was published already in 1975.

A. MERGERS REALIZED WITHIN GERMANY

Mergers realized within Germany always have a Domestic Effect within the meaning of section 130(2) GWB. Such mergers include, for instance, the acquisition of assets or shares in a German company or the formation of a joint venture in Germany, even if the acquirer/founder is a foreign enterprise.

Notably, under section 36(2) GWB (*see infra* Part VII.A), a company and all its subsidiaries are considered one economic entity. Therefore, a merger of enterprises realized abroad is also deemed to constitute a merger of their German subsidiaries and, consequently, is considered to be realized in Germany. Until 1998, the text of the GWB provided for this approach expressly in section 23(3), sentence 4. The FCO, within its memorandum, confirms that it still shares that view.

B. MERGERS REALIZED ABROAD

A merger realized abroad has a Domestic Effect if the merger influences the conditions for domestic competition by changing the market structure in Germany.²² Pointing out that each case might require an evaluation of its particularities, the FCO distinguishes four constellations of main importance: if before the merger, both enterprises (*see infra* Part IV.B.1), only one (*see infra* Part IV.B.2), or none (*see infra* Part IV.B.3) of the enterprises entering into the merger abroad already were engaged in business in Germany, and the formation of a joint venture (*see infra* Part IV.B.4). In detail, the FCO states as follows:

- A Domestic Effect is always given if *both enterprises*, either directly or via subsidiaries, branches, or importers, were already engaged in business within Germany before the merger.
- A Domestic Effect might be given although before the merger *only one enterprise* was engaged in business in Germany if, for example:
 - Production relations (higher and lower production level) or relations between the range of products of the enterprises following the merger are likely to lead to a foreign participant delivering goods into Germany. Whether such future deliveries into Germany are likely usually depends on whether goods of the same or similar kind are already traded between the countries involved, and whether there are no technical or administrative trade barriers to such deliveries.
 - The merger results in a considerable increase of know-how²³ or financial resources of a German enterprise or if intellectual property rights (e.g., patents, licenses) are transferred to the German enterprise.
- In rare cases, the FCO will assume a Domestic Effect even if before the merger *none of the enterprises* had subsidiaries or branches in Germany if such merger, nevertheless, has influence on the market structure in Germany. As an example, the FCO refers to the acquisition of the assets of an Austrian airline by another Austrian airline when the target company merely serves flight connections within Germany.
- Regarding the *establishment of joint ventures realized abroad*, the Domestic Effect primarily depends on the products concerned and the geographical area in which the joint

22. See Judgment of the Supreme Court of May 29, 1979, in WuW/E BGH, *supra* note 20, at 1613, 1615 (1979).

23. Cf. Judgment of the Supreme Court of May 29, 1979, in *id.*

venture operates. The FCO assumes a Domestic Effect not only if the joint venture shall be engaged in business in Germany but also if it is active in a European or world-wide market.

C. TURNOVER IN GERMANY OF AT LEAST DM 50 MILLION

Besides the requirement of the Domestic Effect, notice of a merger must only occur if the turnover thresholds are also fulfilled. In particular, even if a merger has a Domestic Effect in terms of the aforementioned, the parties are not requested to give notice of the merger if at least one party (including subsidiaries) did not achieve a turnover of at least DM 50 million within Germany²⁴ (*see supra* Part III.B).

Notably, according to the memorandum, the FCO considers a merger involving a target company that already on its own achieves a turnover in excess of DM 50 million in Germany usually as having a Domestic Effect. As a result, the parties have to assess the Domestic Effect of the intended merger in detail only in case of mergers realized entirely or almost entirely abroad, that is, if the acquirer has a turnover of at least DM 50 million in Germany and the target enterprise or the joint venture company is situated abroad.

V. Notification Procedure

A. RESPONSIBILITY

According to section 39(2) GWB, the participating enterprises and, in the case of asset deals and share deals, the sellers are responsible for fulfilling the notification requirement.

B. TIME FRAME

The possible time frame for a pre-merger notification has already been discussed above (*see supra* Part III.B). The FCO must inform the enterprises within one month following receipt of the complete notification about whether the FCO has decided to review the proposed merger more closely and, therefore, whether it needs a prolongation of the review period for another three months. The FCO, however, will usually respond to a filing within the first two weeks and, in most cases, decide within the one-month period.

Notably, the Federal Minister of Economics (*Bundesminister für Wirtschaft*) instructed the FCO in 1980 to observe specific rules when handling pre-merger notifications of foreign mergers. Based on these instructions, the FCO, according to the aforementioned memorandum on Domestic Effects in January 1999, will inform the participating enterprises even on the basis of an incomplete notification immediately after such notification that the merger is released if:

- the enterprises plausibly claim that, due to applicable provisions of foreign law or other specific reasonable grounds, they are unable to provide the FCO with all of the information required before consummation; and
- it is already clear from the information rendered or other information that there will be no creation or strengthening of a market-dominating position.

24. GWB § 35(1) no. 2.

C. CONTENTS OF THE NOTIFICATION

Notice to the FCO requires a detailed description of the type of merger (e.g., number of shares acquired and amount of the total participation), the participating enterprises, and the German markets concerned. The description of the enterprises shall include at least the precise name and seat of the enterprises and their German branches, a brief outline of their businesses, a chart indicating affiliates and their participation in Germany, the last available figures for turnover worldwide, the turnover within the Common Market, and the turnover achieved in Germany (e.g., production figures by deducting exports and adding imports) broken down to the fields of activity affected by the merger. Whether and which additional information must be presented to the FCO depends on the specific case, particularly on the information the FCO already gained from other proceedings in that market.

Additionally, the participating enterprises must assess the volume of the German markets affected by the merger and their respective market shares. Depending on the kind of goods or services that are the subject of the transaction, it is often necessary to render additional information in order to enable the FCO to determine the market in terms of interchangeability from the consumers' point of view (*see infra* Part VII.E). Usually, the FCO requests the enterprises to indicate the names, addresses, and estimated market shares of their most important competitors. Moreover, according to section 39(3) sentence 2 no. 4 GWB, the participating enterprises must name any German market within which they have combined market shares equaling or exceeding twenty percent. Notably, this applies even with respect to markets that are not affected by the merger.

The enterprises are requested to explain the bases for the estimations regarding the market shares. Therefore, where appropriate, one should refer to official statistical information from the German Federal Statistical Office (*Statistisches Bundesamt*) or other national or European public institutions, or from associations of manufacturers of the products in question. The enterprises will usually forward their annual reports to the FCO in order to evidence their sales, business activities, branches, and affiliates.

Notably, the filing must be made in German. Furthermore, foreign enterprises are requested to indicate a recipient for the FCO's decisions in Germany within their notification.

D. PUBLICATION

If notice of a merger project has been given in accordance with section 39 GWB, the type of such merger, the corporate names, the seats, and the kind of business of the participating enterprises are published in the Federal Legal Gazette (*Bundesanzeiger*) after consummation of the merger.²⁵ Moreover, the decision in the event of an investigation, any request for a ministerial dispensation, and the dispensation itself will be published.

Apart from this information and during the investigation periods, the FCO is obliged by law to keep the merger, its details, and the information on the enterprises confidential.

E. FEES

The FCO charges fees for the notification proceedings in accordance with section 80(1) and (2) no. 1 GWB. No additional fee will be charged for notification of the merger consummation.

25. *Id.* § 43.

The maximum fee is ordinarily DM 100,000, and in extraordinary cases, DM 200,000.²⁶ The calculation of the fee is within the reasonable discretion of the FCO and depends on the personnel and material expenses of the FCO considering the economic significance of the subject matter.²⁷ Having set the fees for a merger of average impact at DM 50,000 as a standard, the FCO determines the economic impact of the planned merger in question, considering the volume of the turnover the participating enterprises achieve in the German markets concerned, the expected economic advantages of the merger in Germany, and the economic interest of the enterprises with regard to the FCO's decision.²⁸

The (inconsiderable) costs of the publication in the Federal Legal Gazette also must be reimbursed by the participating enterprises.²⁹

VI. Authority of the FCO

A. PROHIBITION OF A MERGER PROJECT AND DISSOLUTION

According to section 36(1) GWB, the FCO must prohibit a merger if it is anticipated that the merger will create or strengthen a market-dominating position unless the participating enterprises provide evidence that the transaction will also result in improvements of the competitive conditions and that these improvements will outweigh the disadvantages of the market domination.

The GWB defines a market-dominating position in section 19(2) and (3) GWB. An enterprise is market dominating as offeror or demander of goods or services if:

- it is without competitors or it is not subject to substantial competition;³⁰
- it has a superior market position in relation to its competitors by taking into account the market shares, financial resources, its access to supply or sales markets, participation in other enterprises, legal or factual barriers to enter markets, factual or potential competition by enterprises resident within Germany and abroad, the ability to change the range of products or commercial services offered or demanded, as well as vice versa the ability of the enterprises buying goods from or selling goods to the enterprise in question to change their range of products or commercial services;³¹ or
- two or more enterprises are market dominating if there is, for factual reasons, no substantial competition between these enterprises regarding certain products and if these enterprises together fulfill the requirements of section 19(1) sentence 1 (nos. 1 and/or 2) GWB.

Moreover, according to section 19(3) sentence 1 GWB, market domination is assumed if an enterprise achieves a market share of at least 33.3 percent.

Some enterprises together are deemed market dominating if:

26. *Id.* § 80(2) sentences 2 (1) and 3.

27. *Id.* § 80(2) sentence 1.

28. See Judgment of the Court of Appeals of Berlin of April 28, 1988, in WuW/E OLG, *supra* note 20, at 4366; Judgment of the Court of Appeals of Berlin of March 30, 1994, in *id.* at 5259, 5260; Judgment of the Court of Appeals of Berlin of March 11, 1994, in *id.* at 5287–5288.

29. See GWB § 80(1) sentence 3.

30. See *id.* § 19(2) sentence 1 no. 1.

31. See *id.* § 19(2) sentence 1 no. 2.

- three or fewer enterprises together achieve a market share of fifty percent; or
- five or fewer enterprises together achieve a market share of 66.6 percent unless the enterprises prove the likelihood of substantial competition even after consummation of the merger plan, or unless the enterprises altogether have no superior market position in relation to their competitors.³²

The FCO's approach to evaluating the effects of a planned merger on the competition in a market is very broad-based and it attempts to account for all specific circumstances. In particular, the FCO not only considers the market shares involved but also, for instance, technical or legal barriers to enter the market or the financial resources of the acquirer (deep-pocket doctrine) and the actual or potential competition between companies active within or even outside of Germany.³³ In cases of foreign mergers, only those resources can be taken into consideration that might in some way influence the conditions for competition in Germany.

In order to avoid a prohibition of the merger project, the parties might offer the FCO to take specific measures, in particular to divest assets or subsidiaries or parts thereof, if it is feared that a market-dominating position will otherwise be created or strengthened. In highly concentrated markets such commitments are often prerequisites for the release of a merger project. The possibility to release a merger project upon the condition of the execution of certain actions agreed between the FCO and the parties has been incorporated into the GWB in the course of the Amendment, while formerly such commitments were only acknowledged by court decision. The kind and scope of such commitments are to some extent within the discretion of the FCO; however, it is not permitted to establish permanent control of the conduct of the participating enterprises.³⁴

The decision to prohibit the merger can be appealed to the court of appeals in Düsseldorf within one month following the decision.

For the sake of completeness, it should be noted that the Federal Minister of Economics can be asked for a dispensation from the prohibition by the FCO if the restraint of competition is outweighed in the specific case by national economic advantages or if there is a public interest of paramount importance.³⁵ However, such circumstances are rarely present and, therefore, releases according to section 42 GWB (formerly section 24(3) GWB) have been (and in all likelihood will continue to be) seldom granted.

B. CONSEQUENCES OF A FAILURE TO GIVE NOTICE OF A MERGER

If the parties to the merger agreement consummate the merger without having notified the FCO, and without being released in terms of Part III.D.3 above, they can be fined up to DM 1 million or up to three times the amount of the additional revenues realized through the offence.³⁶ The amount of the additional revenues can be assessed.

Notably, under section 30 of the German Public Offences Act (*Ordnungswidrigkeitengesetz*), which is different from EU law, in addition to the aforementioned fines addressed to the

32. *Id.* § 19(3) sentence 2.

33. *Id.* § 19(2) sentence 1 (2).

34. *Id.* § 40(3) sentence 2.

35. *Id.* § 42.

36. *Id.* § 81(1) no. 1 and (2) sentence 1.

participating companies, individual Members of the Board and Managing Directors might be fined personally.

Moreover, under German civil law, the merger agreement violating the prohibition of consummation would be null and void.³⁷ Only agreements under the Conversion Act (*Umwandlungsgesetz*), agreements on the integration of a company into another (*Eingliederungsverträge*), agreements to establish a company, and agreements in terms of sections 291 and 292 of the Stock Corporation Act (*Aktiengesetz*, including for example, profit transfer agreements) are exempted from the aforementioned rule of invalidity if they are registered validly in the competent Register.

C. CONSEQUENCES OF A FAILURE TO GIVE NOTICE OF THE CONSUMMATION OF A MERGER

An intentional or negligent failure to notify the FCO of the consummation of a merger can result in a fine of up to DM 50,000.³⁸ The same applies to false, incomplete, or late notifications.

D. LIMITED POWERS OF THE FCO IN CASES OF MERGERS REALIZED OUTSIDE OF GERMANY

Mergers that are realized in Germany, irrespective of the law the companies have legitimately chosen, are subject to binding German antitrust law and, therefore, to the requirements and powers of the FCO, as described above.

Respectively, mergers that are realized outside of Germany are subject foremost to the applicable law of the foreign country in which the merger is carried out. Nevertheless, if such mergers exercised abroad, as explained above, have a Domestic Effect, the GWB is applicable and, in principle, the FCO can prohibit these mergers or levy fines in cases where the parties did not give notice of the merger appropriately.

However, in the event a merger is executed outside of Germany, the powers of the FCO are limited under public international law.³⁹

First, the principles of public international law bind the FCO, as a German public authority, to the territory of Germany. Thus, the FCO is "only" competent and empowered to prohibit a merger realized abroad to the extent it has a restraining effect on a German market. Therefore, transactions consummated in spite of the prohibition of consummation under section 41(1) sentence 1 GWB, are only invalid under German civil law if and to the extent they are consummated in Germany. This might be of paramount importance in the individual case since, under private international law and the respective material German law, certain legal measures must be carried out in Germany in order to become legally binding. In particular, the transfer of shares in a GmbH⁴⁰ or the transfer of real property⁴¹ seated in Germany requires a notarization in front of a German notary,⁴² irrespective of the law the parties have chosen.

37. *Id.* § 41(1) sentence 2.

38. § 81(1) no. 4 and (2) sentence 1.

39. See Gerhard Wiedemann, § 5 *Extraterritoriale Anwendung der Wettbewerbsregeln*, in *HANDBUCH DES KARTELLRECHTS* annot. 3 (Gerhard Wiedemann ed., 1999).

40. See § 15 paras. 3 and 4 of the German Limited Liability Companies Act.

41. See § 925 para. 1 of the German Civil Code.

42. The possibility to notarize a transfer of shares in a GmbH and real property in front of a notary with registered offices in certain regions of Switzerland, which is the usual practice in transactions of significant size, is not the subject of this article.

Additionally, only in the event a merger is at least partially realized in Germany can the FCO serve an official writ addressed to the foreign enterprise via its representatives in Germany (i.e., managers of branches or subsidiaries or, the interpretation of this provision in the Act remains unclear, other individuals or companies the FCO considers to be authorized to represent the companies) and is entitled to levy fines. Therefore, since fines of the FCO are not enforceable outside of Germany, the FCO cannot levy a fine if none of the parties involved has neither its seat nor a representative in Germany.

Furthermore, when deciding upon a prohibition, even when there is a link to the German territory as described above, the FCO must consider both the appropriateness of a prohibition and the impact of such a prohibition on the sovereignty of the countries concerned with respect to the public international law principles of the prohibition to interfere (*Einmischungsverbot*) and the comity of nations.⁴³ The FCO must weigh the type and extent of the foreign country's legitimate interest in applying its own law to a transaction carried out by its domestic companies under such law on the one hand, and the link of the participating companies to the German legal system and the extent and likelihood of a potential effect on German markets on the other.⁴⁴ If the FCO determines that, based upon the above criteria, the foreign country has a clear, overriding interest in applying its own law to the specific case, the FCO shall refrain from enforcing German law.

In practice, the FCO particularly will consider and discuss with the parties whether any commitments to sell certain assets or subsidiaries or to grant licenses to competitors also could abolish the authority's concerns for the market structure in Germany.

It remains unclear whether the courts will accept the FCO's approach to enforce the German merger control rules by prohibiting only a part of a transaction and, thereby, splitting the merger project into two parts, an approach that it followed in the Linde/Lansing case.⁴⁵ In this 1989 case, the FCO decided to prohibit the consummation of the proposed merger only with respect to transactions within Germany and left the transactions abroad, in this case in the United Kingdom, though belonging and integral to the overall proposed structure, aside. The FCO particularly did not consider the U.K. transaction as an illegal consummation of a merger falling within the scope of the pre-merger filing requirements requiring release by the FCO. In the course of the litigation proceedings, the Court of Appeals in Berlin (*Kammergericht*)⁴⁶ shared that approach to distinguish a "German part" and a "non-German part" of the merger project to be handled separately. However, the Supreme Court (*Bundesgerichtshof*)⁴⁷ revised the decisions of the FCO and the Court of Appeals in Berlin. In short, the Supreme Court argued that, with respect to the close intermediate economic relations between the German and the non-German part of the merger project and, in the particular case that involved exclusive li-

43. See Wiedemann, *supra* note 39, at annots. 7 and 25.

44. See Decision of the Federal Cartel Office of April 15, 1993, in WIRTSCHAFT UND WETTBEWERB, ENTSCHEIDUNGSSAMMLUNG ZUM KARTELLRECHT, BUNDESKARTELLAMT [Economy and Competition, Compilation of Anti-trust Decisions, Federal Cartel Office] [hereinafter WuW/E BKartA] 2521, 2540 (1993); Wiedemann, *supra* note 39, at annot. 40.

45. Decision of the Federal Cartel Office of March 3, 1989, in WuW/E BKartA, *supra* note 44, at 2363 (1989); Wiedemann, *supra* note 39, at annot. 46.

46. Judgment of the Court of Appeals of Berlin of March 22, 1990, in DIE AKTIENGESELLSCHAFT [hereinafter AG] 545 (1990).

47. Judgment of the Supreme Court of December 10, 1991, in WuW/E BGH, *supra* note 20, at 2731, 2737 (1991).

censes, in light of the consequences of a partial prohibition for the free trade of goods within the European Union, such distinction was inappropriate and a partial prohibition unjustified.

The aforementioned decision of the Supreme Court has been interpreted in many different ways and, therefore, its consequences for the determination of the powers of the FCO to prohibit mergers realized abroad remain unclear. The FCO subsequently prohibited merger projects realized abroad that it considered to have a restraining Domestic Effect entirely by referring to the economical impossibility of a splitting of the proposed transaction and by arguing that the effects abroad in these cases were of minor relevance compared with the effects in Germany.⁴⁸ It remains to be seen which route the FCO finally will take. In past practice, concerns of the FCO in most cases are resolved through respective commitments of the parties.

To summarize, the FCO's authority to both prohibit mergers realized abroad and levy fines in respect thereof is limited. Due to the necessity of reviewing the kind and economical impact of the individual merger project, it is hard to predict the decision of the FCO and the courts in the particular case. However, if there is a branch or subsidiary in Germany and if at least one party (including activities of subsidiaries) achieves a turnover of at least DM 50 million in Germany, the parties have to notify the FCO of the merger project. Nevertheless, at least with respect to further investments and business activities in Germany, it is strongly recommended, even in cases where there is no branch or subsidiary in Germany, to observe the aforementioned rules of German merger control. In accordance with the aforementioned instruction of the Federal Minister of Economics (*Bundesminister für Wirtschaft*) of 1980 (see *supra* Part V.B), the FCO might decide on such notification in a timely manner.

VII. Glossary of Important Terms

With respect to the aforementioned, it is necessary to explain how the terms *enterprise*, *merger*, *consummation*, *turnover*, and *market* are defined in the GWB and/or construed by the FCO and the courts.

A. ENTERPRISE

The GWB applies to all individuals, corporations, partnerships, or other entities regardless of their legal form, private or public purpose, or their seat engaged in business activities. An intention to make profits is not required, thus, write-off companies are also included within this definition. However, private investors (individuals or groups of individuals) are only deemed enterprises if and to the extent that they hold majority interests in companies.⁴⁹

For assessing the effects of a merger and in order to calculate the turnover figures, the economic units (*einheitliche Unternehmen*) must be considered that might consist of different legal entities. According to section 36(2) sentence 1 GWB, if a participating enterprise

48. See Decision of the Federal Cartel Office of April 15, 1993, in WuW/E BKartA, *supra* note 42, at 2521, 2540 (1993); Decision of the Federal Cartel Office of July 23, 1992, in AG, *supra* note 44, at 363, 367 (1992); Decision of the Federal Cartel Office of August 23, 1989, in WuW/E BKartA, *supra* note 42, at 2405, 2412 (1989).

49. GWB § 36(3).

constitutes a dependent or a dominating enterprise within the meaning of section 17 of the Stock Corporation Act (*Aktiengesetz*) or a group enterprise (*Konzernunternehmen*) within the meaning of section 18 of the Stock Corporation Act, then the enterprises connected in such way are deemed to constitute an economic unit, which leads to the aforementioned consequences. Dependent companies in terms of section 17 of the Stock Corporation Act are separate legal entities over which another enterprise (dominating enterprise) is able to exert, directly or indirectly, a controlling influence. An enterprise, the majority of shares of which are held by another company, is deemed to be controlled by its parent company. In accordance with section 18 of the Stock Corporation Act, if a dominating and one or more dependent enterprises are subject to the common direction of the dominating enterprise, such enterprises shall constitute a group and the individual enterprise shall constitute group enterprises. Moreover, enterprises that are parties to a control agreement in terms of section 291 of the Stock Corporation Act (*Beherrschungsvertrag*) or that have been integrated into the other in terms of section 319 of the Stock Corporation Act are deemed to be subject to a common direction. Separate legal entities that are subject to a common direction constitute a group of enterprises even though none of the enterprises controls the other.

Each of several enterprises acting together in a way that might jointly result in a dominating influence over another enterprise is regarded as a dominating enterprise.

B. MERGER

Mergers (*Zusammenschlüsse*) are defined exclusively under section 37 GWB. The term includes asset deals, share deals, certain agreements, and other measures that enable a company to control another company.

1. Asset Deals⁵⁰

According to section 37(1) no. 1 GWB, the acquisition of all of the assets or of a substantial portion of the assets of an enterprise falls within the scope of merger control under the GWB. A portion of the assets can be substantial in terms of quantity (acquisition of a large portion of all the assets) and/or quality (acquisition of a separate business unit as indicated, for example, by distinct products, personnel, machines, customers, etc.).

Notably, the FCO and the BGH assume that this term covers any acquisition of assets that might have a significant effect on the market position of the acquirer. Therefore, they applied this provision even to the transfer of a mere trademark, which, however, constituted the main value of the target.⁵¹

2. Direct or Indirect Control⁵²

Additionally, a merger in terms of the GWB arises if one or more enterprises achieve direct or indirect control over the entirety or parts of another enterprise or other enterprises. Control can be exercised by right, agreement, or other means that, exclusively or jointly, and with respect to the specific factual and legal situation, presents an opportunity to exercise a dominating influence on another enterprise.⁵³ This clause in particular includes

50. *Id.* § 37(1) no. 1.

51. See Judgment of the Supreme Court of July 7, 1992, in WuW/E BGH, *supra* note 20, at 2783, 2785 (1992).

52. GWB § 37(1) no. 2.

53. *Id.*

property rights and use regarding the entirety or parts of the assets of an enterprise as well as rights and agreements granting a dominating influence on the establishment and the decisions of a board of the enterprise (i.e., the managing directors or at least one of the boards of the enterprise).

3. *Share Deals*⁵⁴

The acquisition of shares in another enterprise is a merger within the meaning of section 37(1) no. 3 sentences 1 and 2 GWB if these shares alone or together with shares already held by the acquirer or its subsidiaries or trustees:

- equal or exceed twenty-five percent of the share capital or the voting rights of the target company; or
- equal or exceed fifty percent of the share capital or the voting rights of the target company.

Section 37(1) no. 3 GWB covers not only the initial acquisition that leads to the passing of the twenty-five percent threshold but also the subsequent acquisition that then surpasses the fifty percent threshold. The acquisition of shares by investment banks, financial institutions, or insurance companies is not deemed to constitute a merger if the shares are acquired in order to resell them and if such resale is executed within one year, unless the acquirers exercise their voting rights conferred upon them by the shares.⁵⁵

4. *Joint Ventures*⁵⁶

According to section 37(1) no. 3 sentence 3 GWB, the simultaneous or subsequent acquisition of shares in another enterprise by several enterprises to an extent of twenty-five percent or fifty percent each, constitutes, apart from the vertical mergers between each of the acquirers and the target enterprise, a horizontal merger between the acquirers regarding those markets within which the joint venture is active (assumption of a partial merger, which reflects the group effects between the acquiring companies). If the joint venture is not yet established or not yet active, one must refer to the market that will be entered.⁵⁷

5. *Other Forms of Material Influence*⁵⁸

Moreover, the GWB assumes a merger when a transaction involves any other combination of enterprises according to which one or more enterprises achieves directly or indirectly an influence upon another enterprise that is material with regard to competition.⁵⁹ This provision will particularly cover the acquisition of minority participation (less than twenty-five percent of the Share Capital) whereas such shares in addition with further circumstances (e.g., the need to request approval of the minority shareholder for certain activities) give the minority shareholder an extraordinary position.

6. *Increase of Participation*

A merger is also assumed even if the merging companies are already affiliated, unless the already existing relationship between the enterprises is not strengthened substantially as a

54. *Id.* § 37(1) no. 3 sentences 1 and 2.

55. *Id.* § 37(3).

56. *Id.* § 37(1) no. 3 sentence 3.

57. See Hans-Jürgen Ruppelt, § 23 GWB, in Langen & Bunte, *supra* note 12, at annot. 52.

58. GWB § 37(1) no. 4.

59. *Id.*

result of the further acquisition.⁶⁰ A substantial strengthening is considered a merger, for example, if the fifty percent threshold will be surpassed or if agreements are concluded that grant additional influence or control.

C. CONSUMMATION OF A MERGER

According to section 41(1) sentence 1 GWB, the enterprises are prohibited from consummating or participating in consummating the merger, unless the specific time periods have expired or the FCO has released the merger plan. When a merger is deemed to be consummated depends on the point in time when the specific transactions become effective. In particular, a conditional transaction or a transaction that is to become effective at a later point in time is not yet consummated in terms of the GWB until the condition is fulfilled or before the agreed date. Therefore, the parties to the merger agreement often agree to a clause according to which the coming into force of the merger agreement is subject to the condition precedent that the FCO has released the transaction or is prevented from prohibiting the merger by expiration of the respective period. In these cases, the merger plan is consummated automatically upon the fulfillment of such condition.

D. RELEVANT TURNOVER FIGURES

It is the GWB's approach to merger control to require the notification of mergers not with respect to the market shares concerned (this aspect will, nevertheless, be taken into consideration to answer the question whether a market-dominating position would be created or strengthened) but because of the turnover volume of the participating enterprises.

In order to determine which companies' turnovers must be considered in calculating the relevant turnover, one must distinguish asset deals from other forms of mergers. When assets are to be sold, one must consider the seller's turnover resulting from these assets, that is, if a production facility is going to be sold, the turnover generated by selling the products made in this production facility must be considered.⁶¹ This turnover, added to the acquirer's turnover is the relevant turnover in asset deals.

In the case of a share deal and in all other forms of mergers, the entire turnover of the targeted legal entity must be added to the acquirer's turnover.

Moreover, in the case of a joint venture, for purposes of determining the notification requirements, the turnover of any company holding stock in the joint venture company of at least twenty-five percent must be added (*see supra* Part VII.B.4).

The notification requirements focus on the annual worldwide turnover of the participating enterprises for the preceding fiscal year, which includes the sales of all affiliated enterprises of a group (parent and sister enterprises as well as subsidiaries) in all branches, regardless of whether these branches are affected by the merger plan. Therefore, all enterprises directly or indirectly controlled by the acquirer or the target as well as the enterprises controlling the acquirer are deemed to be participating.

The turnover must be computed on a consolidated basis, thus excluding intercompany transactions. Value-added tax and consumption taxes are also not to be included in the calculation. Special rules apply with respect to sales of distribution enterprises, banks, insurance enterprises, and publishers of newspapers and periodicals.⁶² Turnover that is gen-

60. *Id.* § 37(2).

61. *Id.* § 38(5).

62. *Id.* § 38(2) to (4).

erated in foreign currencies will usually be calculated by converting them into German marks using the official annual average exchange rates published by the European Central Bank. The currencies that are part of the EURO zone are calculated on the basis of the known fixed converting rates.

E. RELEVANT MARKET

Goods and services belong to a single product market if they are interchangeable in terms of function, preference, and price from the point of view of the average customer of services or buyer of products, who is not necessarily the end consumer. For determining such market, the FCO, if possible, refers to governmental statistics or data rendered by associations of the manufacturers of the goods in question or by lobbyists. Nevertheless, the FCO is not bound to these statements and is generally entitled to determine and examine the markets and their structure on its own. To determine the geographic market, the FCO usually considers Germany as one market, unless there are specific reasons to distinguish regional markets. Market shares usually are calculated based upon value, which means with reference to the entire sales figures in German marks for that market.

VIII. Summary

To summarize, the Amendment to the GWB brought on the one hand a number of significant changes, particularly with respect to the scope of the law's applicability. On the other hand, the procedural requirements for notifying a merger remained mainly the same. In the course of harmonizing the German and the EU merger control provisions, the new GWB specifically refrains from drawing any distinction between pre- and post-merger controls. While pre-merger control was extended by already including transactions involving companies with a worldwide turnover of DM 1 billion, the de minimis exemptions for a so-called affiliation and insignificant markets are simultaneously extended. Moreover, notification is required only where at least one company achieves a turnover in Germany exceeding DM 50 million. Notably, the Federal Minister of Economics will still be entitled to release a merger with respect to an extraordinary public interest.

